NORTON ROSE FULBRIGHT RESPONSE TO EUROPEAN COMMISSION CONSULTATION ON MORE EFFECTIVE EU MERGER CONTROL

Norton Rose Fulbright LLP\(^1\) welcomes the opportunity to respond to the European Commission’s (Commission) July 2014 consultation: Towards more effective EU merger control.\(^2\) This response is based on our general experience advising clients on the EU Merger Regulation (EUMR),\(^3\) and does not represent the views of any individual clients.\(^4\)

The Commission is proposing the following three sets of reforms to the EUMR:\(^5\)

1. Extending the EUMR to capture not only acquisitions of “control”, but also acquisitions of certain non-controlling minority shareholdings giving rise to “competitively significant links”;
2. Reforms relating to case referrals; and
3. Several miscellaneous reforms.

We support the proposed second and third sets of reforms and welcome the Commission’s efforts to streamline the merger notification procedure. In particular:

1. **We welcome the plans to simplify case referral procedures**, including the proposal to abolish the requirement of a reasoned submission to request pre-notification referral from Member States to the Commission under Article 4(5) of the EUMR.\(^6\) Streamlining of the process with regard to referrals between the Commission and national competition authorities (NCAs) will be welcomed by business, and any reduction in procedural delays affecting transactions is good for the broader EU economy; and

2. **We also support the intention to exempt certain full-function joint ventures from notification** if the joint venture is located and operates outside the EEA without any effects on EEA markets.\(^7\) Detailed guidance will be needed to clarify how these concepts would be applied. In particular, we submit that the requirement that the absence of effects in the EEA

---

\(^1\) This response has been prepared by Ian Giles and Jay Modrall. Should the Commission wish to discuss any of the points raised in further detail they can be contacted on the following addresses: ian.giles@nortonrosefulbright.com and jay.modrall@nortonrosefulbright.com


\(^4\) Individuals at Norton Rose Fulbright LLP have made contributions to various other submissions being made to the Commission in response to the 2014 White Paper by various interested associations and other groups. We believe this submission is consistent with the broad message from all those submissions – most notably in the concern over the proposed extension of the EUMR to cover non-controlling minority interests.


\(^7\) 2014 White Paper, page 18.
should not be a separate test, but that the absence of effects should be presumed based on the joint venture’s EEA revenues being below an appropriate threshold.\textsuperscript{8}

The remainder of our response covers the proposed extension of the scope of the EUMR to cover acquisitions of non-controlling interests, and is structured in three parts: first, an executive summary; second, our detailed comments on the Commission’s proposals; and, third, our responses to the specific questions raised in the 2014 Staff Working Document.

1 Executive summary

1.1 We submit that the White Paper fails to make a case for amendment to the EUMR to provide for review of acquisitions of non-controlling minority shareholdings. As noted in the 2014 White Paper and Staff Working Document, competition concerns have arisen in only a small number of previous cases involving the acquisition of interests granting less than decisive influence. It is notable that the vast majority of EU Member States have not felt the need to legislate in this area.\textsuperscript{9}

1.2 In this context, to the extent any intervention is deemed necessary, any new system for reviewing acquisitions of non-controlling minority shareholdings which could harm competition should be as simple as possible. The simplest option would be a self-assessment system as is used currently in the UK. This minimises the burden on both business and regulators (allowing resources to be targeted on other priority areas). We strongly suggest that the Commission reconsider the advantages of such a system as it continues its work in this area.

1.3 If the Commission has nonetheless decided to proceed with targeted transparency\textsuperscript{10} we have concerns that the system currently proposed is overly complicated and does not fully achieve the Commission’s aims. We identify our key concerns and offer suggested improvements below.

Balancing benefits and burdens

1.4 As a starting point, it is critical to ensure that any new system is not overly burdensome for parties or for the Commission. In the overwhelming majority of cases, the acquisition of a non-controlling minority shareholding will not give rise to significant competition concerns. Indeed, the Commission has identified only a small number of past cases which arguably justified intervention. Any system requiring such acquisitions to be notified must be light touch or risk imposing significant burdens on all parties involved, outweighing the advantage to the Commission of being able to examine those deals which could harm competition. Indeed, we

\textsuperscript{8} For example, full-function joint ventures which do not have, or cannot reasonably be expected to achieve, EEA revenues of above €10 million in their first year of operation might be considered to not have an effect on EEA markets.

\textsuperscript{9} As noted in the 2014 White Paper, page 9, only three EU Member States – Austria, Germany and the UK – require notification of acquisitions of non-controlling minority interests.

\textsuperscript{10} 2014 White Paper, page 12.
3 October 2014

consider that a voluntary, self-assessment system would best serve the required purpose and strike the right balance between benefits and burdens.

A competitively significant link

1.5 We support the Commission’s approach to limit the review of acquisitions of minority shareholdings to those which raise competition concerns. However, we are concerned that the proposal to capture transactions which create a competitively significant link will be difficult to implement because of the uncertainties as to how to apply this concept and the lack of relevant information. Notifying parties will face significant burdens in assessing the degree of influence to be held in a competitor or vertically related company, which appear to be disproportionate when the majority of such transactions will be benign\(^{11}\). Moving to a self-assessment system would be the best way to address this burden, where only transactions raising potential concerns would be notified.

Acquisition thresholds

1.6 If targeted transparency is to be adopted, it important that clear cut thresholds apply to ensure that only transactions capable of giving rise to concerns are caught. We suggest that a filing should only be required where a party acquires a shareholding of at least 25 per cent (following the Austrian and German models).\(^{12}\)

Undertakings concerned

1.7 We believe that further clarification should be provided as to which undertakings concerned are to be taken into account when determining whether a filing is needed. In the context of a minority non-controlling investment, only the investor and the target should be considered undertakings concerned.

Information requirements

1.8 Given that the vast majority of transactions involving minority shareholdings will not raise any competition concerns, a light-touch approach is needed as to the information required in any filing. The case allocation request form would appear to be the best model for this purpose. If any documents are required to be submitted, these should be limited to the documents of the minority shareholder relating to the rationale for the acquisition. There should not be any requirement to submit market share data at the information notice stage, given the time and expense involved in collecting such information. If the Commission decides such a requirement

\(^{11}\) As an alternative, using the affected markets market share thresholds from the Form CO would offer parties some comfort where they are unsure as to whether minor competitive overlaps exist.

is necessary, this should be limited to cases where the overlaps in the parties’ activities would amount to affected markets under the Form CO procedure.

**Suspensory and limitation periods**

1.9 We do not consider it appropriate or necessary to have a suspensory period in relation to transactions when: (i) it is acknowledged that the vast majority of minority shareholdings which qualify for review will not raise any competition concerns; and (ii) there is an obvious remedy in those few cases where concerns do arise, as minority shareholdings which do not meet the “decisive influence” threshold will not present challenges in relation to “unsnabbling the eggs”. We also consider that the Commission’s proposal of a limitation period of four or six months is excessive. We propose that three months is reasonable in the circumstances. We anticipate this element of the Commission’s proposal will raise concerns with financial investors who will not welcome the uncertainty associated with a longer-term window for challenge, and that such uncertainty risks damaging the overall appetite for investment in EU business.

2 **Detailed comments on the Commission’s proposals**

*The case for reform and the merits of self-assessment*

2.1 As set out above, we remain unconvinced that the case for reform of the EUMR to cover minority shareholdings has been convincingly demonstrated. It is apparent from the examples which the 2014 Staff Working Paper cites that substantive competition concerns arising in relation to acquisitions of non-controlling minority shareholdings are few and far between. We consider that the Commission has significantly underestimated the additional burden on both business and regulators of a system involving mandatory notification of minority shareholding acquisitions, and anticipate that the number of additional notifications will be far higher than the numbers anticipated in the Staff Working Document. We note in this context that only three current EU Member States have felt the need to legislate in this area. Moreover extension of the EUMR would be likely to lead to extensions of equivalent EU national rules, as well as those...
in non-EU jurisdictions (as discussed further in paragraph 3.10 below) - materially increasing transaction costs and causing delay in relation to transactions that are, in the vast majority of cases, incapable of causing competition concerns due to the lack of decisive influence.

2.2 While we recognise that it is possible that competition concerns can arise from acquisitions of non-controlling minority shareholdings, the policy decision on whether to materially extend the scope of the EUMR should carefully consider the potentially significant chilling effect that this could have on levels of investment in EU business. In this context, if any reform is to be made, the self-assessment model has obvious advantages. It allows parties to decide when to seek the certainty of regulatory approval with the awareness that their transaction is within the scope of the EUMR. This is a model successfully employed in the UK, and which dealt successfully with two of the most high profile examples of minority shareholdings which have raised competition concerns (and are cited in the 2014 Staff Working Paper).16

2.3 We believe that the case for intervention and, if intervention is considered necessary, the case for self-assessment, should be considered further before the Commission proceeds with far-reaching changes to the well-established EUMR model. The comments below go to the specific proposals with regards to targeted transparency, but should be read in the context that there are alternative approaches available to the Commission which may more effectively achieve its policy goals.

**Balancing benefits and burdens**

2.4 Only a very small number of non-controlling minority shareholding acquisitions are likely to raise serious competition concerns. As currently proposed, the targeted transparency system appears somewhat imbalanced - the benefits from capturing a small number of transactions that could potentially give rise to harm seem limited, while the burden that businesses will face in having to assess whether filing an information notice is required, and then making any such filing, seems significant. Indeed, of the concentrations notified to the Commission between 1990 and 2013 under the EUMR, only 1 per cent involved non-controlling minority shareholdings that were relevant to the competitive assessment, and in only 0.38 per cent were such shareholdings found to lead to competition problems.17

2.5 Extending this analysis beyond concentrations notified to the Commission reveals similar results. The Commission scrutinised data for the period 2005-2011 to identify horizontal

---


17 Of the 5,293 concentrations notified to the Commission between 1990 and 2013 “at least 53 merger cases have been identified from 1990 where structural links [acquisitions of non-controlling minority shareholdings] were relevant for the competitive assessment of the transactions. Furthermore, structural links were found to create competition problems in at least 20 of these cases.” See Commission Staff Working Document, Annex 2, page 3.
acquisitions where: (i) the target’s turnover was at least €10 million; (ii) there was no review by the Commission or national authorities; (iii) the target and acquirer were active in the same sector; and (iv) this was neither a purely financial investment nor an intra-group transaction. The Commission found 91 qualifying transactions, only 43 of which had an EU dimension and satisfied the relevant turnover thresholds. It is likely that the vast majority of these 43 examples would not have raised substantive competition concerns. On this basis, the number of acquisitions of even potential concern to the Commission is likely to be materially less than 43 over a six year period, or 7 per year. Notwithstanding this, we believe that under the current proposals, the number of information notices filed - and the number of formal EUMR notifications (made out of caution, and possibly in preference to filing information notices if the burden is not seen as materially higher) - will likely be far in excess of the Commission’s estimates.

2.6 If acquisitions of non-controlling minority interests give rise to significant competition concerns, there are good grounds to believe that this could be sufficiently dealt with under Article 101 and (potentially) Article 102 TFEU. The Commission has disputed this – including by questioning whether there would be an agreement between undertakings for Article 101 to apply: but any agreement between shareholders (i.e. action following a vote) or joint venture agreement could be sufficient and, in any event, there is a low threshold for establishing a concerted practice.

“Competitively significant link”

2.7 The Commission’s proposed definition for a “competitively significant link” is: (i) a competitive or vertical relationship between the acquirer and target; and (ii) an acquired shareholding of 20 per cent, or between 5 and 20 per cent plus certain additional rights (e.g. a seat on the board or access to commercially sensitive information).

2.8 In our view, any new information notice/notification system should avoid tests based on competitive overlaps. The Commission’s concepts of horizontal or vertical overlaps by “sector” rather than relevant antitrust markets are vague and overbroad. Conducting the preliminary filing assessment would be difficult if not impossible, particular if the concept of overlaps is extended beyond the parties’ control groups to include companies in which they have non-controlling minority stakes (as suggested by footnote 67 of the Staff Paper). If the concept of

---

20 We note the Commission’s concern that Article 101 may not be applicable in relation to acquisitions of minority shareholdings in public companies, but we do not believe this has been sufficiently tested. Article 101 has been found to apply in relation to largely unilateral acts between suppliers and customers in the vertical context, and any action by the minority shareholder in situ (even if not amounting to decisive influence) could be argued to be in a context of arrangements involving the target undertaking.
sectoral overlaps were replaced by overlaps in relevant antitrust markets, the preliminary analysis, and the collection of required information, would be even more burdensome given the difficulty of identifying relevant antitrust markets and collecting market data. The burdens associated with either approach would far outweigh any conceivable competition policy benefit in the context of non-controlling minority interests.22

2.9 In the alternative, should the Commission decide that any new notification system should be based on competitive overlaps then we consider that the threshold at which a competitively significant link arises should be set at the same level as for the affected markets under the Form CO23. This would reduce the potential burden for parties, although we still consider such burden would be significant.

Acquisition thresholds

2.10 We consider it important that clear cut thresholds apply to the level of interest acquired to ensure that only those transactions that are capable of giving rise to concerns are caught. We suggest that a filing should only be required where a party acquires a shareholding of at least 25 per cent, where the EUMR turnover thresholds are satisfied, and where there are sufficient plus factors, such as significant (through non-controlling) rights to participate in management.

2.11 In the alternative, should the Commission decide that a simple 25 per cent threshold is insufficient, we consider this could be supported by a secondary threshold of 15 per cent combined with clearly identified plus factors. These plus factors need to be clearly differentiated from both (i) standard minority shareholder protections, which would not give rise to EUMR jurisdiction; and (ii) those rights capable of granting decisive influence, which require full filing under the current EUMR. We have not seen reference to any cases where a minority shareholding below 15 per cent without plus factors has led to substantive competition concerns. We therefore consider that the proposed safe harbour threshold should be increased from 5 per cent to 15 per cent.

2.12 A related concern is the consequences of the failure to file an information notice where it is later determined that an information notice was required (assuming the Commission does not adopt a self-assessment system modelled on the UK system). Especially if the system finally adopted is based on vague and subjective concepts like competitive overlaps, there should be no penalties where a good-faith determination was made that no filing was required.

---

22 Even applying the 30 per cent Form CO threshold, the lack of a de minimis threshold on the other side of the customer/supplier relationship would mean that any transaction involving a party with a market share that is greater than 30 per cent could trigger notification obligations in a range of industries where the target/acquirer is inevitably a potential customer (e.g. electricity, mobile telephony, computers, software, water, transportation or fuel, office stationery etc.).

23 A combined 20 per cent horizontal market share overlap, or a 30 per cent vertical market share overlap.
**Undertakings concerned**

2.13 Under the EUMR today, a large number of transactions are notifiable even where the target is small, because two or more parent companies having joint control satisfy the Community dimension thresholds. (This problem will not be fully addressed by the proposals in the White Paper). If the concept of undertakings concerned were expanded to include all shareholders acquiring, or having, non-controlling minority stakes that otherwise meet the criteria for an information notice, a very large number of information notices would be required. We submit that the undertakings concerned by a minority non-controlling investment group should be limited to the investor and its control group and the target and its control group.

**Information requirements**

2.14 Any information notice needs to be sufficiently simple and less burdensome than a short Form CO in order to incentivise parties to engage with the new regime rather than resorting to the certainty of the existing regime. We therefore believe the information notice should be modelled on the case notification form used under the current EUMR process, requiring only very light-touch details in relation to the parties, markets and transaction.

2.15 We consider it disproportionate for parties to have to provide market share information in any notification of a non-controlling minority shareholding acquisition. Often the relevant data may not be available, and the question of market definition unsettled. Indeed, a minority acquirer is likely to find it more difficult to obtain information from the target than in the case of a traditional acquisition of sole or joint control. To the extent that parties have to engage the services of additional consultants, including economists, this would add even greater complexity and cost to the process. Bearing in mind the low likelihood in each case of minority shareholding acquisitions raising substantive competition concerns requiring parties to engage in market definition and market share analysis will place an unnecessary burden on them. In the event the Commission decides that market share information should be provided, this should only be required where there is a realistic prospect that the acquirer and the target have overlapping activities that would lead to the creation of an affected market within the terms of the Form CO.

2.16 We do not believe that it is appropriate to require provision of internal documents in relation to an information notice under the proposed targeted transparency system. However, if such a requirement is made, it should be strictly limited to internal documents created by/for the board of the acquirer specifically relating to the rationale for the acquisition. Such documents are within the acquirer's control and therefore reasonably easily accessible. The burdens on business of the section 4(c) requirements under the Hart Scott Rodinho Act in the USA (or under section 5(4) of the Form CO) should not be under-estimated, particularly in a context where a non-controlling shareholder may not have access to internal documents held by the target business.
Suspensory and limitation periods

2.17 The proposals envisage a 15 day suspensory period during which acquisitions of minority shareholdings might not close.\(^{24}\) This period is linked to the period allowed for consultation of NCAs. It is notable in this context that only three NCAs (Austria, Germany and the UK) have the power to intervene in relation to acquisitions of minority shareholdings under their national rules. It is possible the Commission envisages changes in national legislation across the EU in order to harmonise with the reforms to EUMR currently contemplated. If so, this only reinforces the importance of a light-touch system that does not create a precedent for a burdensome process for this largely benign category of transactions, which may then be replicated across the EU – and potentially beyond.

2.18 In the context of minority shareholdings, we do not see a significant concern with regard to unscrambling the eggs – it would be relatively straightforward to require the sale of the shareholding in question if a concern were ultimately found.\(^{25}\) To the extent that the Commission has concerns that the shareholding in question is leading to a decisive influence (i.e. blocking significant strategic or commercial decisions), the standard suspensory period under the current EUMR would apply.

2.19 Further, the White Paper suggests a period of four to six months after a transaction has been implemented within which the business community could come forward with complaints about that transaction.\(^{26}\) Given the expected difficulties of applying the proposed jurisdictional thresholds – even for the parties concerned – it seems questionable whether third parties would be able to determine, with an appropriate degree of certainty, that there has been a failure to notify a qualifying transaction. Financial investors in particular will be concerned about the uncertainty raised by this element of the proposal.

3 Responses to the specific questions raised by the Commission in the 2014 working document

**Question 1(a):** Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15 days waiting period.


\(^{25}\) This happened without any particular difficulties in both of the most notable minority interest cases in the UK, BSkyB / ITV and Ryanair / Aer Lingus. *Supra* note 14.

3.1 There are a number of elements of the proposed reforms that are likely to raise concerns for relevant stakeholders in general, including in relation to restructuring transactions and equity liquidity. Specifically:

(a) The current lack of certainty and detail around points such as whether there is a competitively significant link is likely to worry investors that they will need to notify benign transactions for review;

(b) A similar concern arises in relation to the very low levels of shareholding (5 per cent) currently envisaged as sufficient to trigger an information notice obligation, and uncertainty as to the plus factors that need to be considered. All of this uncertainty adds to the costs of transactions which are currently relatively straightforward and which - by and large - do not raise any competition concerns;

(c) Investors are, based on the views expressed to us, extremely concerned by the proposed 15 working day suspensory period (which does not seem justified given the ease with which non-controlling minority acquisitions can be unwound);

(d) The four or six month window within which third parties could complain to the Commission adds further unhelpful uncertainty and risks sending out mixed messages about whether transactions meeting the thresholds strictly must always must be notified;

(e) Related to this, clarity is needed as to the consequences if parties fail to notify; and

(f) Finally, to the extent that an information notice is required for certain categories of transactions, investors are concerned that the extent of the information required may be akin to a “Form CO light”. The Form CO involves significant transaction costs, and this should not be imposed lightly on a broader, largely benign, class of transactions.

3.2 Separately, we note that under the current proposals only the restructuring activities of financial institutions, in the normal course of business, and for a limited period of time, would be exempt from the scope of the EUMR. In practice, restructuring activities are undertaken by a broad range of entities, and often proceed over long periods of time. We would recommend broadening the current proposals so all restructuring transactions are treated alike.

*Question 1(b): Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?*

3.3 As discussed in section 2 above, we believe that, among other things, the exclusion of benign financial investments from the expanded scope of the EUMR could be achieved by clarifying the scope of the undertakings concerned for applying the jurisdictional thresholds, expanding the

---

scope of the exception for restructuring activities, and increasing the level of shareholding that triggers any filing obligation.

3.4 Moving to a self-assessment system, as in the UK, would be a straightforward way in which to allow non-controversial investment transactions to proceed by taking unencumbered view that notification is unnecessary. This approach appears to have worked well in the UK and reduces a potentially significant resource burden on the Commission (and NCAs) in having to review a large number of investment transactions which raise no competition concerns.28

*Question 1(c): Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?*

3.5 This is discussed above in paragraphs 2.13 - 2.15. As a starting point, the current proposed definition of a competitively significant link requires parties to consider their competitive relationship. The Commission has indicated that this should not require a detailed antitrust analysis of the relevant markets, and instead would take into account whether companies are active in the same sector and geographic area.29 We submit that the Commission underestimates the burden that any competitive overlap analysis would impose, particularly in the context of minority shareholdings where information is limited, and strongly urge the Commission to eliminate this concept in any proposed information notice system. In the event the Commission decides that market share information should be provided, then we consider that this should only be required where there is a realistic prospect that the acquirer and the target have overlapping activities that would lead to the creation of an affected market within the terms of the Form CO.

3.6 We caution against adoption of the US approach, relying on the provision of internal documents to assess market structure and dynamics. The burden of collecting such documents can be extensive, and as such, the scope of documents required should be restricted, we suggest, to documents prepared by/for the board of the acquirer specifically relating to the rationale for the transaction. We would emphasise that the overwhelmingly benign nature of the transactions in question justifies a light-touch approach of this nature.

*Question 1(d): Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.*

---

28 The analogy with the policy decision of the Commission in introducing self-assessment under Regulation 1/2003 is apposite in this context. By reducing the burden of reviewing non-controversial arrangements under Article 101, the Commission has been able to better focus its resources on more serious infringements.

3.7 In addition to considering the cost of preparing any filings, it is critical to consider the cost of **assessing whether a filing is required in the first place**. As noted above, there are a number of uncertainties which will affect the complexity of this analysis - e.g. which undertakings need to be considered, whether information can be obtained for all relevant undertakings, and possible issues of market definition.

3.8 Under the current EUMR regime it can be relatively quick and easy to determine whether a filing is required if a minority shareholding does not come with sufficiently “strategic” veto rights to give rise to joint control, and often can be done without parties having to provide their turnover data. Under the proposed system, we are concerned that a more complicated, and therefore more costly, analysis may be required. Uncertainty in relation to thresholds and/or the extent of information required in an information notice will add to this cost.

3.9 A related concern is that emerging competition regimes often look to the Commission’s approach for guidance. The rules in emerging regimes are often not clear, increasing costs and uncertainties for parties to global deals. Thus, to the extent the Commission itself introduces an unduly onerous and uncertain reform to the EUMR, this is likely to have a knock-on effect on costs faced by businesses in other jurisdictions to the extent such jurisdictions look to incorporate the Commission’s reforms into their own regimes.

3.10 In terms of the costs of preparing filings, this is likely to vary significantly depending on a number of factors, in particular: (i) the complexity of the case and any competition issues; (ii) the information required in any filing, including whether this is easy to obtain from relevant parties, whether this requires consideration of complex market definition issues, etc.; and, (iii) the extent of any pre-notification engagement with the Commission. At a high level the information that the Commission has suggested might be required in any filing seems similar to that required for a short-Form CO and therefore the financial cost in terms of legal fees would be akin to preparing such a filing, which is not insignificant. On top of this there would be costs for business in terms of the management time that must be devoted to any filing process, but this is difficult to quantify.

3.11 It is common for preparation, submission and clearance for even a “no issues” short Form CO to result in external legal fees for companies of over €100,000. This excludes the internal management time which is as, if not more, valuable for the company in question. Moreover, the delay caused by such additional regulatory processes may have such a chilling effect that the

---

30 The EU competition law regime is followed and emulated in many countries that are establishing or have recently established independent competition law regimes. See, for instance, Marcus Pollard, *More than a cookie cutter: the global influence of European competition law*, 5(5) Journal of European Competition Law & Practice 1, 1 (May 2014); Anestis S Papadopoulos, *The international dimension of EU competition law and policy* page 266 (2010).

31 The EU competition law regime is followed and emulated in many countries that are establishing or have recently established independent competition law regimes. See, for instance, Marcus Pollard, *More than a cookie cutter: the global influence of European competition law*, 5(5) Journal of European Competition Law & Practice 1, 1 (May 2014); Anestis S Papadopoulos, *The international dimension of EU competition law and policy* page 266 (Cambridge University Press: 2010).
levels of investment in EU business are affected in comparison with other, less onerously regulated jurisdictions.

**Question 1(e): Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?**

3.12 We do not believe that a suspensory period is appropriate. Acquisitions of minority shareholdings are easily reversible, both in structure and effect. Divestment will eliminate the shareholding and any anti-competitive effects arising from the competitive links. This is not the case for acquisitions of control, where it is very difficult to reverse the integration of two previously independent entities. Thus, the proposed suspensory period is inappropriate, and, for completeness, the proposed period of 15 working days seems excessive when the standard Phase I review period is only slightly longer at 25 working days.

3.13 In terms of the possibility of referral-back, we note that the national rules in most EU Member States do not permit the review of an acquisition of a non-controlling minority interest. Thus, we do not consider it appropriate that Member States should generally have the ability to request a referral-back if that is the Commission’s intention; only those Member States whose national rules provide for the review of such transactions should have this option.

4 Conclusion

4.1 In conclusion, we believe careful consideration remains necessary before the Commission takes forward any proposals to reform the EUMR to allow review of acquisitions of non-controlling minority shareholdings. A self-assessment system appears the most appropriate tool to address competition concerns in this area, which we acknowledge can arise, but only infrequently. This system appears to work well in the UK and under Regulation 1/2003 in relation to Article 101.

4.2 If the Commission does decide to proceed with the proposed targeted transparency system, we recommend that a number of changes be made to the current proposals to clarify certain aspects of the proposals and to minimise the burdens on all parties concerned. Without greater certainty on the requirements for business, there is a danger that the new system would be dysfunctional, while we believe the number of notifications made to the Commission would be far higher than its analysis anticipates.

4.3 In relation to the proposed reforms for case referrals and other miscellaneous reforms, we generally agree with the Commission’s proposals, although further clarification is needed as to how the exemption for non-EEA full-function joint ventures will apply in practice.

Norton Rose Fulbright LLP
3 October 2014